

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-1391

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

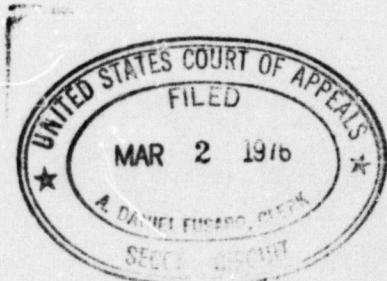
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UNITED STATES OF AMERICA, :
-against- :
Sergio Peralta Oyanedel, :
Defendant-Appellant. :
-----x

75-139

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PJS

On Appeal From Judgment Of
Conviction From United States District
Court, Southern District of New York

BRIEF FOR THE APPELLANT
PURSUANT TO ANDERS v. CALIFORNIA



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
-against- : 75-1391
SERGIO PERALTA OYANDEL, :
Defendant-Appellant. :
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BRIEF FOR THE APPELLANT
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STATEMENT OF THE CASE

The appellant was indicted in a three-count indictment charging conspiracy to violate 21 U.S.C. §812 and §841(a)(1)(B) and two substantive counts. Mr. Oyanedel was charged only on the first of the two substantive counts. Indicted with him were Lionel Marquez, who was tried at the same time; James Richardson, who was deceased at the time of trial; Hector Perez and Rafael Sarmiento, both of whom, on information and belief, were fugitives at the time of trial.

Counsel was appointed under the Criminal Justice Act. A motion was made to dismiss pursuant to United States v. Marion, 404 U.S. 307 (1971), for discovery, and an oral motion was made for a severance based on potential spill-over. The

motion to dismiss was denied. The severance motion was denied, and the discovery motion was granted in part.

At the end of the Government's case, the Court dismissed the conspiracy count pursuant to United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974). The defendant was convicted after trial and sentenced to five years unsupervised probation and subsequently deported by the Immigration and Naturalization Service as an alien illegally remaining in the United States. His whereabouts is presently unknown to defense counsel.

FACTS

(Prosecution's Case)

Sergio Castillo lived with one Lena Gotes (T.6*) at 20 Sickle Street, New York City. Lena Gotes, who subsequently became a Government informer and testified on the trial of this matter, was a boarder at his house. On a day in August, 1972, some time between the 19th and 24th day thereof, Castillo brought his new born son home from the hospital and saw Lena Gotes and the Appellant Oyanedel, as well as co-defendant Rafael Sarmiento, in his apartment with Lena Gotes (T.7).

*All references to transcript are denoted T. before the page number.

Lena Gotes had gotten there because on the 22nd day of August, 1972, Sarmiento had assisted her from the hospital where she had had her foot operated on. He took her from there in order to consummate a rapid sale of cocaine to which he had just gotten access (T.86). He claimed that the sale must be rapid because the source of the cocaine was leaving within three days and his (Sarmiento's) regular buyer was out of New York (T.186-187). Ms. Gotes agreed and after some initial preparation and negotiation with Lionel Marquez, Sarmiento sent the cocaine in two large plastic bags to his house by way of the appellant, Oyanedel. All negotiations were made with Sarmiento and then finally Sarmiento said that Oyanedel would bring the cocaine (T.192).

Castillo testified that during that evening, Lionel Marquez and a friend arrived and subsequent to their arrival the defendant Oyanedel came to the apartment and dropped a bag of white powder on the floor (T.22,30,32-34, 153). That package was identified as cocaine (T.340) for which approximately \$13,000 to \$16,000 was paid by Marquez. (T.41,340).

(Defense's Case)

The defendant Sergio Peralta took the stand in his own behalf (T.545, et seq.). He denied knowing the co-defendant Marquez (T.552) and denied ever delivering cocaine to anyone (T.549-550). Testimony by his common-law wife supported his story.

The jury chose to disbelieve the defense and convicted the appellant of the substantive count involving him which was submitted to the jury.

POINTS OF LAW

Point I

SEVERANCE

The determination not to grant the severance was completely within the Judge's discretion. He acceded to every defense request to separate the two defendants, Marquez and Oyanadel, in the minds of the jurors.

United States v. Jones, 374 F.2d 414 (2d Cir. 1967);

United States v. Brown, 335 F.2d 170 (2d Cir. 1964).

The fact that the defendants would not have been joined had there not been a conspiracy count which subsequently was dismissed for multiplicity, does not require reversal since counsel has been able to find no evidence of a bad faith joinder by the prosecution and such bad faith is necessary to mandate that result. Schaffer v. United States, 362 U.S. 511 (1960); United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963); United States v. Manfredi, 275 F.2d 588 (2d Cir. 1960).

Point II

DELAY IN INDICTMENT

Although there was an allegation of prejudice because of the delay in indictment, United States v. Marion, 404 U.S. 307 (1971), the government's affidavit in opposition to that motion stated in terms that the government was not aware of the crimes charged until too late to indict the defendant before his 26th birthday, the reaching of which was the alleged prejudice. See United States v. Roberts, 515 F.2d 642 (2d Cir. 1975); United States v. Brown, 511 F.2d 920 (2d Cir. 1975).

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